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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRY LUGENE PARKER,

Defendant and Appellant.

E074742

(Super.Ct.No. ICR22535)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Reversed.

Jan B. Norman and Siri Shetty, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Lance E. Winters, Chief
Assistant Attorney General, Julie L. Garland and Charles C. Ragland, Senior Assistant
Attorneys General, and Lynn G. McGinnis, Robin Urbanski and Donald W. Ostertag,
Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, petitioner Kerry Lugene Parker was convicted on three counts of first degree murder, on a felony-murder theory, with felony-murder special circumstances. In 2019, he filed a petition to vacate the murder convictions under Penal Code section 1172.6.¹ The trial court denied the petition; it ruled that the felony-murder special circumstance findings conclusively established that he was not eligible for relief.

Petitioner contends that this was error. Under *People v. Strong* (2022) 13 Cal.5th 698 (*Strong*) — decided while this appeal was pending — he is correct.

I

DISCUSSION

Under section 1172.6, the trial court must vacate a first-degree murder conviction that was based on a felony-murder theory, unless the petitioner either (1) was the actual killer, (2) had the intent to kill and aided and abetted the commission of first-degree murder, or (3) was a major participant in the underlying felony and acted with reckless indifference to human life.² (§ 1172.6, subd. (d)(3), incorporating § 189, subd. (e).)

¹ All further statutory citations are to the Penal Code.

The petition was actually filed under former section 1170.95. (Enacted by Stats. 2018, ch. 1015, § 4, amended by Stats. 2021, ch. 551, § 2.) While this appeal was pending, former section 1170.95 was renumbered as section 1172.6, with no change in text. (Stats. 2022, ch. 58, § 10.) We will use section 1172.6, somewhat anachronistically, to refer to whichever one of the two statutes was in effect at the relevant time.

² Or — we note for completeness, although it is not relevant here — unless the victim was a police officer killed in the course of his or her duties and the defendant knew or should have known that. (§ 189, subd. (f).)

A felony-murder special circumstance, however, requires that the defendant either (1) was the actual killer, (2) had the intent to kill and aided and abetted the commission of first-degree murder, or (3) was a major participant in the underlying felony and acted with reckless indifference to human life. (§ 190.2, subds. (a)(17), (b)-(d).)

Accordingly, when first confronted with the question, this court held that a true finding on a felony-murder special circumstance conclusively established ineligibility for relief under section 1172.6. (*People v. Jones* (2020) 270 Cal.Rptr.3d 362, review granted Jan. 27, 2021, S265854, depublished and transferred with directions Sept. 28, 2022.)

While this appeal was pending, however, *Strong* held that *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) “substantially clarified” the requirements of a felony murder special-circumstance finding. (*Strong*, *supra*, 13 Cal.5th at p. 706.) Therefore, a felony murder special-circumstance finding made before *Banks* and *Clark* were decided does *not* conclusively establish ineligibility for relief under section 1172.6. (*Strong*, *supra*, at pp. 710-720.)

The People concede that, in light of *Strong*, the trial court erred, and we must reverse the order appealed from. We agree, and we will do so.

Petitioner also argues that we should direct the trial court to issue an order to show cause. (See § 1172.6, subd. (c).) Because the trial court denied the petition based on the felony-murder special circumstances, it has not yet ruled on whether the petition otherwise stated a prima facie case. We decline to review a ruling the trial court has not

made. We leave the question of whether to issue an order to show cause to be decided by the trial court in the first instance.

Finally, petitioner also argues that he was denied his right to counsel when the trial court proceeded to deny his petition after his counsel declared a conflict. Because we are reversing on other grounds, we need not reach this contention.

II

DISPOSITION

The order appealed from is reversed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.